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Department of Registration of Department of Regulation of the State of Utah v. Jeff Stone et al : Brief of Respondent

Utah Supreme Court

Robert M. McRae; Loni F. DeLand; Attorneys for Defendants-Appellants;
Robert B. Hansen and Leon A. Halgren; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

DEPARTMENT OF REGISTRATION OF DEPARTMENT OF REGULATION OF THE STATE OF UTAH,

Plaintiff-Respondent,

vs. Case No. 15711

JEFF STONE and/or LAKEWOOD ENTERPRISES, INC., dba NEO-DENTURE CLINIC,

Defendants-Appellants.

BRIEF OF RESPONDENT

Appeal from a Judgment of the Third Judicial District Court
In and For Salt Lake County, Utah
The Honorable Stewart M. Hanson, Jr., Judge

ROBERT B. HANSEN
Attorney General

LEON A. HALGREN
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

McRAE AND DeLAND
Robert M. McRae and
Loni F. DeLand
72 East Fourth South, Suite 355
Salt Lake City, Utah 84111

Attorneys for Appellants

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for contempt of court on 120 separate violations of a temporary restraining order wherein appellants had been enjoined from engaging in the practice of dentistry without a license.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a verdict of guilty the defendants-appellants appeal.

RELIEF SOUGHT ON APPEAL

Respondent requests this court to affirm the judgment of the court below.

STATEMENT OF FACTS

The material facts as outlined by appellants and as supported by the record are correct and accurate. There is no need, therefore, to restate them in respondent's brief.

ARGUMENT

POINT I

THE CONSECUTIVE SENTENCES IMPOSED BY THE COURT BELOW FOR THE SEPARATE ACTS OF CONTEMPT COMMITTED BY APPELLANTS WAS PROPER AND IS SUPPORTED BY LEGAL AUTHORITY.

Appellants argue that the consecutive sentences imposed upon them for each of the 120 violations of the restraining order are invalid. Neither the statutes nor the cases cited by appellants support this argument on the facts.

Utah Code Annotated, § 76-1-401, and Utah Code Annotated, § 76-3-401, simply allow the district court to exercise its discretion as to whether sentences are to be served consecutively or concurrently. The latter section seems to apply to felonies and states in subpart (3) that a court can impose consecutive sentences for offenses arising out of a single criminal episode. These sections cannot be construed to prohibit an imposition of consecutive sentences for separate acts of contempt. They are hardly relevant.

Appellants cite McCoy v. Severson, 118 U. 502, for the proposition that at common law sentences imposed at the same time for separate crimes were to run concurrently unless statute or the court directed otherwise. In the case at bar the court directed otherwise.

The cases cited by appellants are all distinguishable from the case at bar. State v. Willhote, 40 N.J. Sup. 405, 123 A.2d 237; In re Ward, 51 Cal Rptr 272, 64 C.2d 672, 414 P.2d 400, cert denied 385 U.S. 923, 17 L.Ed 2d 147; and State v. Starlight Club, 17 U.2d 174, 406 P.2d 912, are not contempt cases and are not factually similar to the case at bar. State v. Willhote, supra, involved two closely proximated reckless driving offenses; In re Ward, supra, involved a lesser included offense (robbery); and State v. Starlight Club, supra, involved statutory violations of Utah's liquor laws that were induced on different occasions. Gautreaux v. Gautreaux, 220 La. 564, 57 So. 2d 188; Beck v. Frontier Airlines, 174 Neb. 172, 116 N.W.2d 281; United States v. Orman, 207 F.2d 148; Yates v. United States, 355 U.S. 66, 2 L.Ed 2d 95; and Codespoti v. Pennsylvania, 418 U.S. 506, 41 L.Ed 2d 912, are contempt cases. Gautreaux, supra, stated that each case must be analyzed by itself to determine whether there are separate acts or one continuous act. That case held two closely related outbursts in a

court proceeding to be one continuous act. In Beck, supra, the contempt consisted of a failure for an airline to obey an affirmative injunction. The court held the contempt to be one continuous act but upheld the $12,000 fine ($1,000/day). This case is easily distinguishable from the case at bar. In Beck, supra, there were no separate acts as in the case at bar - there was just one period of refusal and inaction. In both Orman, supra, and Yates, supra, the court refused to allow consecutive punishments for each refusal to answer questions in a single court proceeding. The court in Orman, supra, explained the reason for its decision, i.e., that the questions related to the same facts and line of questioning. In Codespoti, supra, the court allowed to stand a series of direct, summary contempt sentences all imposed in a single court proceeding. None of these cases are factually close to the case at bar.

As the court in Gautreaux, supra, stated, each case must be analyzed by itself to determine whether there are separate acts or just one continuous act. In the case at bar, appellants wilfully chose to violate the restraining order after having been given formal notice of it by personal service. By appellant Stone's own admission, he made 120 sets of dentures in direct violation of the order. (R. 49) Each set was made for a different party under unique

circumstances. Appellant Stone was completely aware each time that his services for a particular individual violated the order. Respondent submits that the trial judge correctly ruled that each of the 120 violations was a separate act of contempt. The cases that are factually on point all recognize that consecutive sentences are proper for separate acts of contempt. These cases all support the trial court's finding of separate acts of contempt.

In Ex Parte Genecov, 143 Tx. 476, 186 S.W.2d 225, petitioner was charged with thirty-six separate violations of an injunction forbidding him and others from discharging pollutants into certain rivers. The trial judge affixed his punishment at $50 fine and one day's imprisonment for each violation, aggregating a total fine of $1,500.00 and thirty days' imprisonment. Although the fine was much greater than the statutory maximum for a single contempt, the Texas Supreme Court upheld the judgment and stated that due process had not been violated. In Rapp v. United States, et al., 146 F.2d 548, the Ninth Circuit affirmed a judgment below imposing a fine of $500 for three acts and a 30-day jail sentence for each of the other three acts. The judge ordered the jail sentences to be served concurrently, presumably due to the "stiffness"of each sentence. The appellant had received from six tenants higher rentals than

allowed by a previously issued injunction. For other cases on point where courts have assessed multiple contempt penalties for violations of an injunction or restraining order, see Donovan v. Superior Court, 39 Cal.2d 848, 250 P.2d 246; Golden Gate v. Superior Court, 65 Cal. 187, 3 P. 628; Solano Aquatic Club v. Superior Court, 165 Cal. 278, 131 P. 874; and State v. McCarley, 74 Kan. 874, 87 P. 743. Also, see Kenimer v. State, 81 Ga. App. 437, 59 S.E.2d 296, where the court recognized that every day petitioner kept his child in violation of the court's order (238 days) could be deemed a separate act of contempt.

It is quite clear from the foregoing authorities that when separate acts in contempt of an injunction or restraining order are established, the courts have assessed penalties for each act and the sentences have run consecutively. In the case at bar appellant Stone defiantly admitted to 120 separate acts of contempt, apparently believing he could flout the law and receive a minimal penalty.

The sentences for each act of one-half day in jail for appellant Stone and a $100 fine for the appellant corporation are minimal. It seems obvious that the trial judge considered the aggregate jail sentence and fine to be just and simply used the separate acts as part of the computation to arrive at the proper sentences. In view of the

appellants' wilful defiance of the restraining order, it would do injustice to the judicial system for this court to adopt appellants' argument that the violations were but one continuous act and to impose a mere one-half day jail sentence on appellant Stone and a $100 fine on the corporation.

The trial judge did not abuse his discretion in holding appellants in contempt for 120 separate acts.

POINT II

THE SENTENCES IMPOSED UPON APPELLANTS ARE NOT EXCESSIVE AND DO BEAR A REASONABLE RELATIONSHIP TO THE GRAVITY OF THE OFFENSE.

This court has stated that holding a party in contempt of court and the making of orders related thereto are matters that lie within the trial court's discretion, and that the trial judge's determinations will not be reversed or modified in the "absence of any action in that regard which is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of his discretion." Bartholomew v. Bartholomew, 548 P.2d 238. The trial judge is certainly in the best position to review all the facts and circumstances and determine the severity of the penalties.

In light of the facts of this case, it cannot be said that the trial judge abused his discretion in

sentencing appellant Stone to sixty days in jail and fining appellant corporation $12,000. Appellant Stone committed 120 separate acts in violation of the restraining order. These acts were wilful and in direct defiance of the order. He had full knowledge of this court's recent decision that his "denture practice" was encompassed within the practice of dentistry as defined by statute. He was given notice of the subsequently issued restraining order and chose to flout it, apparently thinking he could get away with a minimal penalty or none at all. There are no mitigating factors in this case. A more open defiance of a court order than that in the case at bar is unimaginable. This is the sort of open, unjustified contempt of the judicial system that the crime of contempt is meant to punish.

Appellant Stone argues that since his actions were not shown to be seriously injurious to the public, that his sentence should be light. Apparently this was a part of his calculated plan to defy the restraining order. The purpose of criminal contempt is to punish the contemnor in order to vindicate the authority of the judicial system. Therefore, the argument of "little public injury" is not relevant or material to the issues on this appeal.

Appellant Stone also argues that a sixty-day jail sentence is ludicrous in view of today's sentencing

standards. This appears to be yet another consideration in his calculated plan to defy the order. Again, the trial judge is in the best position to determine the sentence and whether or not it is to be suspended in part or whether the sentences for each act are to run concurrently or consecutively.

The cases cited by appellants in an effort to establish that their sentences are excessive are easily distinguishable. In Harris v. Harris, 14. U.2d 96, 377 P.2d 1007, the contemnor father had made a substantial effort to comply with the child support decree. Appellant in the case at bar made no effort to comply, but quite to the contrary, chose to flout the order. In Shotkin v. Atchison, 235 P.2d 990, the contemnor was not guilty of numerous acts as in the case at bar, and the failure to comply in that case seems much less egregious than appellant Stone's open defiance. Also, in Shotkin, supra, it was found that the trial court could have easily avoided the contempt.

The trial judge did not consider a sixty-day jail sentence for appellant Stone and a $12,000 fine for the appellant corporation to be excessive. In light of appellant Stone's wilful defiance of the restraining order, the legal substance of which had already been decided by

this court, it cannot be said that the trial judge abused his discretion when sentencing appellants.

CONCLUSION

The determination of the trial court in contempt cases is within that court's discretion and will not be reversed or modified unless that discretion is abused.

The cases that are factually similar to the case at bar recognize the power of the courts to impose consecutive sentences upon contemnors for separate acts of concontempt in violation of an injunction or restraining order. The trial court's finding that appellants are guilty of 120 separate acts of contempt is supported by fact and law and was not an abuse of discretion.

In view of appellants' open defiance of the restraining order, the sentences and fines imposed were not excessive and were not an abuse of discretion. The judgment of the trial court should be affirmed.

Respectfully submitted this 8th day of June, 1978.

ROBERT B. HANSEN
Attorney General

LEON A. HALGREN
Assistant Attorney General

Attorneys for Respondent